COMMITTEE REPORT 7-15(3) TABLED ON FEB 20 2003

Northwest Territories Legislative Assembly

Standing Committee on Accountability and Oversight

Report on the Review of the Access to Information and Protection of Privacy Commissioner's Annual Report 2001-2002

Chair: Mr. Charles Dent

Northwest Territories Legislative Assembly
Standing Committee on Accountability and Oversight

FEB 2 [illegible]

THE HONOURABLE ANTHONY (TONY) WHITFORD, MLA
SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Accountability and Oversight has the honour of presenting its Report on the Review of the Access to Information and Protection of Privacy Commissioner's Annual Report 2001-2002 and commends it to the House.

Charles Dent
Chairperson

P.O. Box 1320
Yellowknife
Northwest Territories
X1A 2L9
T: (867) 669-2299
F: (867) 873-0432
www.assembly.gov.nt.ca

MEMBERS OF THE STANDING COMMITTEE ON ACCOUNTABILITY AND OVERSIGHT

Charles Dent
MLA Frame Lake
Chair

Floyd Roland
MLA Inuvik Boot Lake
Deputy Chair

Brendan Bell
MLA Yellowknife South

Jane Groenewegen
MLA Hay River South

Sandy Lee
MLA Range Lake

Paul Delorey
MLA Hay River North

David Krutko
MLA Mackenzie Delta

Michael McLeod
MLA Deh Cho

Bill Braden
MLA Great Slave

Leon Lafferty
MLA North Slave

Steven Nitah
MLA Tu Nedhe

STAFF MEMBERS

Doug Schauerte
Deputy Clerk

Donna Huffam
Committee Researcher

Review of the
Access To Information and Protection of Privacy
Commissioner's Annual Report 2001/2002

Background

The Legislative Assembly of the Northwest Territories enacted its first Access to Information and Protection of Privacy Act (ATIPP) on December 31, 1996. The stated intention of the Act is to "promote, uphold and protect access to the information that government creates and receives and to protect the privacy rights of individuals".

The Information and Privacy Commissioner is an independent officer of the Legislative Assembly, but is required under section 68 of the Access to Information and Protection of Privacy Act to prepare and submit an Annual Report on the Commissioner's activities to the Legislative Assembly. Ms. Elaine Keenan Bengts was re-appointed as the Northwest Territories' Information and Privacy Commissioner on July 1st, 2000 and will serve a 5-year term.

The Access to Information and Protection of Privacy Act provides the public with a means of accessing the information that government collects through its departments and various regulatory bodies. The legislation was also designed to place restrictions on the disbursal of certain information in order to protect the privacy rights of individuals. The Act also gives individuals the right to see and make corrections to the information about themselves.

General Comments

The Standing Committee on Accountability and Oversight met with the Access to Information and Protection of Privacy Commissioner, Elaine Keenan-Bengts, on December 4, 2002 to review the Commissioner's Annual Report for the year 2001-2002.

The Standing Committee noted the ATIPP Commissioner's increasing frustration with the lack of progress to date on recommendations made in her previous reports to the Government. The Committee agreed that the Government's lack of action could be considered a "deemed refusal" of both the Commissioner's recommendations and the Committee's own recommendations made in their annual review of the ATIPP report.

The Committee notes the Government agreed with many of the recommendations made by both the Commissioner and the Standing Committee after the review of the ATIPP Commissioner's 1999/2000 Annual Report. In its response to the Standing Committee's

report the Government committed to the implementation of several amendments to the Act. However, as of the end of 2002 the Standing Committee has yet to receive a legislative proposal for the amendments, let alone a draft of the amendments to consider. The Committee feels that the Government has had considerable time in which these amendments could have been prepared.

The Committee does not believe that the Government is deliberately attempting to halt the implementation of the proposed amendments to the ATIPP Act. However the Committee does suggest the drafting of said amendments has been put on the back burner while the Government addresses other issues it considers more vital to the public interest. The Committee maintains that the proposed amendments, especially the amendment that would protect citizens from the distribution of personal medical information held by private companies, is vital to the public interest and should be placed higher on the Government's list of current priorities. The Committee would like to see these amendments passed before the end of the 14th Assembly.

> ***The Standing Committee on Accountability and Oversight recommends that the Government table the agreed-upon draft amendments to the ATIPP Act as soon as possible, preferably in the February/March Session.***

Recommendations from the ATIPP Commissioner's 2001-2002 Report

The inclusion of municipalities as public bodies under the current Act

As the Commissioner has pointed out in the past three annual reports, municipalities currently have no legislation regulating the release of names, addresses or other private information on web pages or in other public documents. Municipal officials from both Yellowknife and Hay River have identified this as a serious concern.

During the review of the Commissioner's 1999-2000 report the Government committed to providing information and consulting with communities about the possibility of including municipalities under the current NWT ATIPP Act. Recent letters to the Committee updating us on the status of this amendment show that there has been little action taken to address this issue.

The Standing Committee fully supports the Commissioner's recommendation that municipalities be included under the Territorial ATIPP law or new legislation be drafted to deal with municipalities' use of public information.

Canadian Territories considered "Federal works"

The Commissioner has also repeatedly pointed out that new federal legislation entitled *Personal Information and Electronic Documents Act (PIPEDA)* regulating the collection, storage and use of personal information in the private sector will come into full force on January 1st, 2004. As of January 1st, 2001 this legislation came into effect for "federal works" and for companies who transfer information over provincial/territorial borders.

The Federal Privacy Commissioner considers the Northwest Territories, Yukon and Nunavut as being "federal works" under the Act and therefore the Federal Commissioner has now taken on the responsibility of investigating all complaints made in this area.

The NWT ATIPP Commissioner recommends the establishment of territorial legislation in order to avoid having local issues handled by a federal body.

The Standing Committee noted that despite a letter from all territorial Justice ministers questioning the Federal Commissioner's interpretation of "federal works" he has refused to alter his opinion.

The Committee also noted the GNWT continues to maintain that it will review the federal legislation and its effect on the NWT in 2006, two years after the federal PIPED Act goes into full force for all of Canada. However, Members note that the Act has actually been "in force" for all of Canada's territories since its inception in 2001, at least in the view of the Federal Commissioner. Therefore the Standing Committee has two recommendations to make on this issue.

> ***The Standing Committee on Accountability and Oversight once again recommends that the Government of the Northwest Territories establish privacy legislation dealing with private sector businesses in order to avoid federal jurisdiction in this area of law.***
>
> ***The Standing Committee on Accountability and Oversight also recommends that the government of the Northwest Territories review the effect of the federal Personal Information and Electronic Documents Act on the NWT as soon as possible rather than in 2006.***

Regulation of private health industries

The Commissioner is concerned that while publicly run health bodies are subject to the ATIPP Act, other private health companies such as pharmacists, dentists, chiropractors, etc are not. Given concerns about the practice of companies selling health information to drug manufacturers and potential invasion of privacy issues the Commissioner would like to see legislation such as the Health Information Act of Alberta. This legislation

regulates the practices of all public and private health organizations and companies in respect to the release of information, among other issues.

In response to concerns raised by the Standing Committee the Government stated that private health care information will be covered by the Federal PIPED Act as of January 2004. The Government therefore does not deem it necessary to pass an amendment of this nature to the current NWT ATIPP Act.

The Standing Committee on Accountability and Oversight agrees with the Commissioner that there is a need to protect the public from disclosure of health information by private health care companies. The Federal Government's PIPED Act was designed to be implemented in stages to allow territories and provinces the time necessary to establish their own privacy legislation. This legislated protection should either be included under the current Northwest Territories ATIPP legislation or should be a part of a new territorial law designed to protect NWT citizens.

> ***The Standing Committee on Accountability and Oversight once again recommends that the Government either expands the current NWT Access to Information and Protection of Privacy Act or establishes new legislation to protect NWT citizens from the disclosure of personal information by private health care companies.***

Deemed Acceptance/Refusal Within Thirty Days Amendment

The NWT ATIPP Commissioner referred to her 1999/2000 Annual Report suggesting that an amendment be added to the ATIPP Act specifying that the head of a public body would be deemed to have accepted the Commissioner's recommendation if that public body had not responded within thirty days.

In the review of the Commissioner's 1999/2000 Annual Report the Committee noted that no other ATIPP or Freedom of Information and Protection of Privacy Acts in other Canadian jurisdictions currently contain a "deemed acceptance clause". In fact the Committee noted most other jurisdictions use a "deemed refusal" clause. The AOC did not agree with the Commissioner's recommendation at that time and instead suggested an amendment stating that the head of a public body would be deemed to have refused the Commissioner's recommendation if that public body has not responded within thirty days.

The Government agreed with the Committee and stated it would implement a "deemed refusal" amendment to the Act. The Committee notes however, that as of the end of 2002 the Committee has yet to see a proposed amendment to the NWT ATIPP Act.

As the Standing Committee reviewed the Privacy Commissioner's 2001-2002 report, it re-considered the Commissioner's concerns regarding the use of the "deemed refusal" clause and the concern she had that it would be used to, in effect, reverse the recommendation of the Commissioner.

The Standing Committee consulted with other Canadian jurisdictions and found that, in practice, the "deemed refusal" clause is considered a refusal to release the records in question. Given the Commissioner's concerns about the possible misinterpretation of a "deemed refusal of the Commissioner's recommendation" clause the Standing Committee would like to suggest alternative wording. The Committee suggests that the Government adopt a "deemed refusal to release the documents" clause. This amendment would address both the Commissioner's concerns about clarity within the Act and would protect the public from the inadvertent release of private documents.

The Committee asked the Commissioner if this new wording would satisfy the Commissioner's concerns about a "deemed refusal" clause. The Commissioner stated that while it does provide more clarity it still leaves the complainant with no further option than a costly appeal to the NWT courts.

The Committee considered the Commissioner's concerns, however, ultimately decided that the deemed refusal of release of documents clause was a more appropriate action for the government to take.

> ***The Standing Committee on Accountability and Oversight once again recommends that the Government adopt a "deemed refusal" amendment to the Access to Information and Protection of Privacy Act. The Committee further recommends the wording be such that should the head of a public body not respond within the required 30 days to the Access to Information and Protection of Privacy Act Commissioner's recommendation(s) the head is deemed to have refused access to the records in question.***

Privacy Complaints

The Commissioner re-iterated her need for an amendment to the ATIPP Act clarifying her authority to investigate and make recommendations in the event of a breach of privacy provisions in the Act. The Commissioner states that although she currently lacks the official authority to do so, she has been reviewing, investigating and making recommendations with respect to breaches of provisions of the Act dealing with personal privacy. In the absence of such a review and recommendations, the only other option would be for a government employee to be prosecuted under the Act. As the Commissioner points out in her report, most of the offences are accidental and therefore should not proceed to the courts.

The Standing Committee agreed with the Commissioner's initial recommendation in her 1999-2000 report and recommended to the Government that the Act be amended to give the Commissioner authority to investigate and make recommendations in the event of a breach of privacy provisions in the Act. The Government stated that it also agreed and committed to an amendment of the Act. Again, however the Standing Committee has yet to see the proposed change to the Act.

Use of Public Registries On-line

The Commissioner informed the Committee in her report that ATIPP Officers across Canada are increasingly concerned about the use of public registries, such as personal property registry information, on-line. While this type of information has always been publicly available it has enjoyed what some has described as "practical obscurity", due to the relative difficulty in accessing a specific file. Now that such databases are becoming available on-line new software can sort and sift through vast amounts of information in a short period of time. This could allow for the substantial violations of privacy provisions and could allow stalkers to obtain victims' addresses or criminals to commit identity fraud. The Commissioner recommends that the Government investigate the possibility of limiting access to such databases on-line in order to protect the public.

Records Data and Directory

The Commissioner spoke of the need for Government departmental ATIPP personnel to keep accurate records of all contacts and requests made in relation to their department. While the Commissioner has records for her own investigations she feels that data about the number of information requests received and filled by the department would be of value as well.

The Committee agreed that any future need for training of staff in government departments could only be identified through the use of such data on information requests. The Committee would like to encourage departmental ATIPP Co-ordinators to maintain records on information requests, filled or denied, and supply them to the Commissioner on an annual basis.

The Commissioner would also like to see an up to date directory listing each departmental ATIPP Co-ordinator with current contact numbers. The Commissioner feels that by publicly listing the personnel access to information will be more easily obtained.

Conclusion

In conclusion the Standing Committee on Accountability and Oversight would like to thank the Commissioner, Ms. Elaine Keenan-Bengts and her staff for appearing before the Committee to present the 2001-2002 Annual Report. The Committee looks forward to reviewing a bill shortly bringing forward many of the recommendations the Commissioner has provided over the years.

The Standing Committee on Accountability and Oversight requests the Executive Council table a comprehensive response to this report within 120 days in accordance with Rule 93(5) of the Rules of the Legislative Assembly.